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April 22, 2004

VIA ELECTRONIC SUBMISSION

Ms. Marlene H. Dortch
Secretary
Office of the Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: **Memorandum of Ex Parte Presentation**
WC Docket No. 04-30, Emergency Request for Declaratory Ruling

Dear Ms. Dortch:

On April 21, 2004, Paul Mancini, Ramona Carlow, George Moreira, Tom Hughes, Christopher Heimann and the undersigned met with Bill Maher, Jeff Carlisle, Rob Tanner and Russ Hanser of the Wireline Competition Bureau's Competition Policy Division to discuss SBC's position in the above referenced docket. The attached outline was used as a basis for discussion during the meeting.

Pursuant to Section 1.1206(b) of the Commission's rules, this letter and attachment are being electronically filed. I ask that this letter be placed in the files for the proceedings identified above.

Please call me should you have any questions.

Sincerely,

/s/ Brian J. Benison

CC: Bill Maher
Jeff Carlisle
Rob Tanner
Russ Hanser

SBC Connecticut
April 21, 2004
WC Docket No. 04-30

THE COMMISSION SHOULD ACT ON SBC CONNECTICUT'S PETITION AND DECLARE THE DPUC'S DECISION UNLAWFUL

In December 2003, the Connecticut Department of Public Utility Control (DPUC) issued a declaratory ruling that SBC Connecticut (SBC) must provide unbundled access to certain hybrid fiber-coaxial (HFC) facilities – facilities that are not part of SBC's telecommunications network and that SBC does not use, and has never used, to provide telecommunications services – to Gemini Networks CT, Inc. (Gemini) at cost-based rates. In reaching this determination, the DPUC ignored the unbundling requirements of the Act, relying on an impairment analysis that has been vacated by the D.C. Circuit and repudiated by the Commission in the *Triennial Review Order*. The DPUC further ignored the Commission's specific determination that ILECs need not unbundle next generation facilities to provide broadband services. If allowed to stand, the DPUC's decision would encourage other states to ignore the limits on unbundling established by the Act and adopted by the Commission, and thwart the Commission's broadband policies by undermining ILEC and CLEC incentives to invest in next generation networks.

1. The Connecticut Superior Court Decision Does Not Moot SBC Connecticut's Request for Declaratory Ruling.

- On April 1, the New Britain, Connecticut Superior Court vacated, remanded and stayed the DPUC's decision because it failed to consider whether unbundling of the HFC facilities was technically feasible, as required by state law.

- Although the DPUC's decision is stayed, the court's decision does not moot SBC's petition.

    - The court did not address the merits of SBC's claims that the DPUC's decision was inconsistent with the 1996 Act and the Commission's rules; it deferred consideration of those issues because they are pending before this Commission.

    - The court, nevertheless, stated that "the DPUC correctly determined that the HFC facilities constitute UNEs (unbundled network elements) which are used to provide telecommunications services and that their unbundling is in the public interest and consistent with federal law." *Southern New England Telephone Co. v. Connecticut Dept. of Pub. Util. Control, et al.*, No. CV 04 0525443S, Slip Op. at 5 (Sup. Ct. New Britain Apr. 1, 2004). SBC has sought clarification that the Court was not reaching the merits of those issues, but rather merely was acknowledging that the DPUC's decision addressed those questions as required by state law.

    - In any event, the court's statements are inconsistent with federal law for the reasons articulated in SBC's petition.

- It is clear that, absent Commission action on SBC's petition, the DPUC will adopt an order concluding that it is technically feasible to unbundle the HFC facilities and require SBC to provide access to those facilities. Because such a decision would thwart the Commission's broadband policy, the Commission should issue a declaratory ruling that requiring SBC to unbundle the HFC network would be inconsistent with federal law and policy.

2. Proposed Declaratory Rulings

- The DPUC is bound by the Commission's unbundling determinations. As the D.C. Circuit recognized in *USTA I*, the unbundling provisions of the 1996 Act require a balancing of competing interests. *USTA I*, 290 F.3d 415, 427 (D.C. Cir. 2002). Congress assigned this task to the FCC and precluded the Commission from sharing that authority. *USTA II*, Slip Op. at 12-18.

- States may not rely on state law as independent authority to adopt unbundling requirements that are inconsistent with federal law and Commission policy.

    - The Commission's decision not to unbundle next-generation broadband facilities "takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute," precluding inconsistent state requirements. *Bethlehem Steel Co. v. New York State Labor Relations Bd.*, 330 U.S. 767, 774 (1947); *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000) (state law requiring car manufacturers to install airbags immediately must give way to federal law because it conflicts with DOT's policy determination that requiring immediate installation of airbags would undermine other policy goals).

    - Any attempt by a state commission to usurp the Commission's authority by adopting a different balancing of interests necessarily would thwart both congressional intent and Commission policy.

    - The Commission itself made clear in the *Triennial Review Order* that states may not establish unbundling requirements that exceed the limits on unbundling established by the Act and Commission policy, and specifically invited parties to seek a declaratory ruling if a state required unbundling of an element for which the Commission found no impairment or otherwise declined to require unbundling. *Triennial Review Order* at paras. 192-95.

- The DPUC's decision conflicts with the Commission's decision to limit access to broadband capable loops. In particular, it conflicts with the Commission's findings that:

    - CLECs are not impaired in their ability to provide broadband services without access to broadband capable loops – including hybrid fiber-coaxial loops (which the DPUC determined were equivalent to the facilities at issue here).

- CLECs are not impaired without access to broadband capable loops even to provide narrowband services if the ILEC provides access to copper loop facilities.

- Limiting access to such facilities would encourage ILECs and CLECs to invest in next generation networks consistent with the requirements of section 706.

- Copper loops and TDM-based DS1 and DS3 loops thus are the only loop facilities that must be unbundled.

- The D.C. Circuit upheld each of these determinations in *USTA II* as a proper application of the Commission's authority under section 251(d)(2) and section 706. *USTA II*, Slip Op. at 34-46.

    - The DPUC's conclusion that, despite the availability of copper loops, Gemini would be impaired without access to the HFC network (on the ground that HFC facilities are "more efficient" than copper twisted pair[s]") is flatly inconsistent with these holdings, and thus unlawful.

- The DPUC's decision flouts the unbundling standards of the Act as interpreted by the Commission and the federal courts.

    - The DPUC's exclusive focus on Gemini's business plan conflicts with the Commission's conclusion that a carrier-specific impairment analysis is improper. *Triennial Review Order* at para. 115.

    - The DPUC ignored the Commission's instructions that the Act requires consideration of the availability of facilities from alternative sources – including other UNEs.

    - The DPUC also ignored SBC's retail and tariffed offerings, contrary to *USTA II*. Slip op. at 33 (The "impairment analysis [under the Act] must consider the availability of [ILEC] . . . services when determining whether would-be entrants are impaired . . . What the Commission may not do is compare unbundling only to self-provisioning or third-party provisioning, arbitrarily excluding alternatives offered by the ILECs.").

- The DPUC's decision conflicts with the network modification requirements of the *Triennial Review Order*.

    - ILECs are required only to make "routine modifications" – that is, "an activity that the incumbent LEC regularly undertakes for its own customers." 47 C.F.R. § 51.319(a)(8); *Triennial Review Order* at paras. 632-40. The FCC explained that, under section 251(c)(3), ILECs cannot be required "to *alter substantially* their networks" in order to provide access to UNEs. *Triennial Review Order* at para. 630 (emphasis in original) (citing *Iowa Utils. Bd. v. FCC*, 120 F.3d at 813).

- Unbundling the facilities at issue would require SBC to spend millions of dollars to upgrade and maintain the facilities, which SBC would not do for its own customers.

- The HFC facilities at issue are not network elements as defined by the Act and thus are not subject to unbundling.

  - The Act defines a network element as "a facility or equipment used in the provision of a telecommunications service," which is "the offering of telecommunications for a fee directly to the public." 47 U.S.C. §§ 153(29), 153(46).

  - The HFC facilities are not part of SBC's local network, were never used to provide telecommunications to the public, and cannot now be used to provide telecommunications.

  - The DPUC itself recognized this in 2000, holding that the facilities were not "used or useful" for providing telecommunications. While SBC did conduct a limited trial of HFC-based telephony in 1995, it never offered HFC-telephony to the general public, and therefore did not offer telecommunications services over the HFC network.

  - The DPUC's reliance on the FCC's treatment of dark fiber is inapposite because, unlike dark fiber, the HFC facilities are not routinely used to provide telecom services, nor are they "easily called into service." *Triennial Review Order* at para. 58. Indeed, the Telco would have to spend millions of dollars to call the HFC facilities into service.